

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 24 2003

Claudette

OFFICE OF  
MANAGING DIRECTOR

David R. Conn  
Deputy General Counsel  
McLeodUSA Technology Park  
6400 C Street, SW  
Post Office Box 3177  
Cedar Rapids, Iowa 52406-3177

Re: Request for Waiver of Late Charge Penalty for  
FY 2002 Regulatory Fees  
Fee Control No. 00000RR06-03-063

Dear Mr. Conn:

This is in response to your request dated December 18, 2002, for waiver of the penalty fee charged to McLeodUSA Telecommunications Services, Inc. (McLeod) for the late payment of its Fiscal FY 2002 regulatory fees, which were due September 25, 2002. You state that McLeodUSA made a good faith effort to comply with this deadline, and that you have confirmed that a check for \$368,259.10 to cover McLeodUSA's 2002 regulatory fees was sent via First Class mail to the appropriate Mellon Bank address on September 20, 2002. You also state that the Commission has previously waived a late payment penalty for regulatory fees that were mailed five days before the regulatory fee deadline, and thus you request that the Commission do here as well. Specifically, you cite a letter in which the Commission waived the late penalty for West Beach Broadcasting Corporation (West Beach) in 2001 because of the continued disruption of the mail after the terrorist attacks of September 11, 2001. Finally, you also state that the Commission's FY 2002 regulatory fee system, including late penalty fees, raises constitutional issues.

The Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. More specifically, the Commission's rules provide that "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... which was not paid in a timely manner. A timely fee payment ... is one received at the Commission's lockbox bank by the due date specified by the Commission or by the Managing Director." 47 CFR Section 1.1164 (emphasis added).

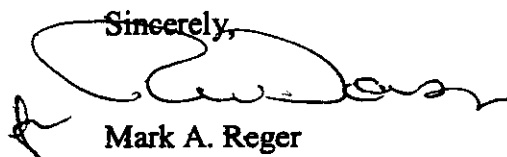
We perceive no basis for waiver of the late penalty. With specific respect to FY 2001 regulatory fees, the Commission granted waivers to this rule in some instances in which we found that the untimely receipt of the fee was the result of the clearly unforeseeable events of September 11, 2001, including the ensuing interruption of mail and air courier service. The West Beach fee letter you cite fell into that special category. Here, by contrast, with respect to the FY 2002 fee requirement, no such extraordinary circumstances exist to justify waiver of the rule. Therefore, it is the obligation of the licensee responsible for regulatory fee payments to ensure that the Commission receives the fee payment no later than the final date on which regulatory fees are due for the year. Your request does not indicate or substantiate that McLeodUSA met this obligation.

You also contend that the constitutionality of the regulatory fee scheme is in doubt because it raises revenue for the federal government, but was adopted by the Commission. You note that the Origination Clause of the Constitution requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const., art. I, section 7, cl. 1. The Commission's regulatory fee requirement implements Section 9 of the Communications Act of 1934, as amended. Section 9 provides that the Commission shall assess and collect regulatory fees to recover the costs of specific regulatory activities of the Commission. 47 U.S.C. Section 159(a) (1). A statute that provides for monetary assessments to fund a particular governmental program, as does Section 9, "is not a 'Bill for raising Revenue' within the meaning of the Origination Clause." *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990); *see also Sperry Corp. v. United States*, 925 F.2d 399 (Fed.Cir. 1991) (upholding statutory fee assessment and finding *Munoz-Flores* Origination Clause analysis applies in case where Congress establishes assessment obligation after the creation of the governmental program.)

Accordingly, your request for waiver of the late charge penalty for late payment of the FY 2002 regulatory fees is denied. Payment of McLeodUSA's FY 2002 late fee is now due. Payment in the amount of \$92,064.78 must be submitted together with a copy of Bill # FY02-9-0005 (copy enclosed) within 30 days from the date of this letter. You are cautioned that the failure to submit payment as required may result in further sanctions and the initiating of a proceeding to recover the penalty and any accrued interest pursuant to the provisions of the Debt Collection Improvement Act.

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark A. Reger  
Chief Financial Officer

Enclosure

00000 PRG-03-063

ORIGINAL

**McLeodUSA®**

DEC 18 2002

December 18, 2002

RECEIVED

DEC 18 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Ms. Marlene N. Dortch  
Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Attn: Mr. Andrew S. Fishel  
Managing Director

Re: McLeodUSA Telecommunications Services, Inc. (FRN 0003716073)  
Request for Waiver of Late Penalty, Bill No. FY02-9-0005

Dear Mr. Fishel:

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") recently received an invoice from the Federal Communications Commission ("FCC" or "Commission") requesting payment of \$92,064.78 for a late penalty fee that the Commission has associated with McLeodUSA's 2002 regulatory fees. The invoice has been assigned Bill No. FY02-9-005 and seeks payment of the late penalty fee by December 19, 2002. A copy of this invoice is included with this letter as *Attachment A* for your reference. Pursuant to section 1.1166(a) of the Commission's rules, 47 C.F.R. § 1.116(a), McLeodUSA hereby respectfully requests a waiver of this late penalty fee for the reasons stated below.

McLeodUSA made a good faith effort to timely submit payment of its 2002 regulatory fees. We have confirmed internally that a check for \$368,259.10 to cover McLeodUSA's 2002 regulatory fees was sent via First Class mail to the appropriate Mellon Bank address from our Accounts Payable Department on September 20, 2002, or five days prior to the September 25, 2002 regulatory fee deadline. Although it is not clear when Mellon Bank actually received our fee payment, our records show that the Mellon Bank cashed the check on September 26, 2002.

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Mr. Andrew S. Fishel  
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The Commission has previously waived a late payment penalty for regulatory fees that were mailed five days before the regulatory fee deadline, and thus McLeodUSA respectfully requests that the Commission do so here as well. Specifically, last year, the FCC waived the late penalty for West Beach Broadcasting, Corp.'s ("West Beach") 2001 regulatory fee payment.<sup>1</sup> Due to the events of September 11 and the resulting interruption of mail service, the Commission extended the deadline for regulatory fee payments last year until September 26, 2001. Four days after the FCC extended the regulatory fee deadline and five days before the new deadline, West Beach mailed its regulatory fee payment from its offices in Washington State to the Mellon Bank in Pennsylvania. Mellon Bank's records showed, however, that the fee was not received until one day after the deadline, or on September 27, 2001. West Beach requested a waiver of the regulatory fee late penalty that it was assessed, citing to the fact that it mailed the payment five days before the deadline, which, under normal circumstances, would have allowed sufficient time for it to be received by the Mellon Bank in a timely manner. In granting the penalty waiver to West Beach, the FCC noted that the company had mailed its payment five days before the deadline, but "even the best of planning" did not prevent the check from being received by the Mellon Bank until one day after the deadline due to the continued disruption of the mail since September 11.

Similar to West Palm, McLeodUSA made a good faith effort to timely submit payment of its 2002 regulatory fees by mailing its check five days before the Commission's deadline. Fortunately, this year, there was no need for the FCC to extend the payment deadline as mail disruptions were not an issue during this year's regulatory fee filing period. As such, it was reasonable for McLeodUSA to expect that mailing its payment five days before the deadline would ensure timely receipt by the Commission at the Mellon Bank, particularly with its offices in Iowa being over 1,900 miles closer to the Mellon Bank's location in Pennsylvania than West Palm's offices are in Washington State.

Accordingly, McLeodUSA respectfully requests that the Commission grant its request for waiver of the late filing penalty. McLeod's good faith efforts to submit timely payment of its 2002 regulatory fees are exactly the same efforts that West Palm made last year, which the Commission found were sufficient to grant a waiver penalty.<sup>2</sup> Moreover, McLeodUSA had even more reason than West Palm to believe that its 2002 regulatory fee payments would be timely submitted as McLeodUSA mailed its payment from a location 1,900 miles closer to the Mellon

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<sup>1</sup> Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to James Tilton, West Beach Broadcasting, Fee Waiver Request for Station KWDB, Fee Control No. 01928835078007, dated May 30, 2002.

<sup>2</sup> McLeod notes that the FCC did not routinely grant waiver requests for any regulatory fees untimely received during last year's filing period. In fact, the Commission denied another waiver request for regulatory fees mailed one day before the new deadline, noting that mailing the payment from Minnesota one day prior to the deadline did not demonstrate that the company mailed the payment in sufficient time for it to reach the Mellon Bank in Pennsylvania. See Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to Michael O. Ostbye, Rural Services of Central Minnesota, Fee Waiver Request, Fee Control No. 00000RROG-02-023, dated May 1, 2002.

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Bank than West Palm during a period where the U.S. postal service was not experiencing such extensive service disruptions to warrant a extension of the regulatory fee payment deadline. Given the facts of the instant case, application of a \$92,000 penalty to McLeodUSA is unduly harsh.

Additionally, in support of its waiver request, McLeodUSA notes that Commission's FY 2002 regulatory fee system, including the late penalty fees, raises constitutional issues. Article I, Section 7, Clause 1 requires "all Bills for raising Revenues shall originate in the House of Representatives."<sup>3</sup> However, the FY 2002 regulatory fee system was adopted by the Commission, not the House of Representative.<sup>4</sup> While the Supreme Court has held that revenue raised to support a particular program specified by a federal statute is constitutional,<sup>5</sup> the FY 2002 regulatory fee system, in contrast, was implemented by the Commission under section 159 of the Communications Act of 1934, as amended, 47 U.S.C. §159, to raise money for the government generally. Therefore, because the FY 2002 regulatory fee system was adopted by the Commission to raise revenue to support the government generally, and not to fund a specific program, it is likely unconstitutional.

In sum, granting a waiver to McLeodUSA would avoid an unduly harsh penalty given the facts, and would be appropriate and proper because McLeodUSA made a good faith and reasonable effort to timely submit payment of its regulatory fees as West Beach did, for which the FCC has granted a similar waiver request. Furthermore, McLeodUSA submits that the Commission should grant it a waiver of the regulatory fee penalty assessment due to the questionable constitutionality of the FY 2002 regulatory scheme, including the late penalty fees.

If you have any questions regarding this request, please contact the undersigned.

Respectfully submitted,



David R. Conn  
Deputy General Counsel

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<sup>3</sup> U.S. Const. Art. I, § 7, cl. 1.

<sup>4</sup> See *Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, Report and Order, 17 FCC Rcd. 13203 (2002).

<sup>5</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990); see also *Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991).

|  |                          |  |                |
|--|--------------------------|--|----------------|
| <b>Bill Number</b>   | <b>Current Bill Date</b> | <b>Please write your bill number on your remittance.</b> |                |
| FY02-8-0006  | 11/19/02                 | <b>Payable to:</b><br>[Redacted]                         |                |
|  |                          | <b>Send a copy of this bill to:</b><br>[Redacted]        |                |
| <b>Total Amount Due</b>  |                          | <b>Due Date</b>  |                |
| \$92,064.78  |                          | 12/19/02   |                |
| <b>Total Amount Due Must Be Received By</b>  |                          |  |                |
| 12/19/02   |                          |  |                |
| <b>SPECIAL INSTRUCTIONS (OPTIONAL):</b><br>25% LATE PENALTY FINE FOR FY 2002 REGULATORY FEE(S) RECEIVED AFTER SEPTEMBER 25, 2002   |                          |  |                |
| Please attach a copy of this bill to your payment to ensure proper credit.   |                          |  |                |
| <b>Payment Type Code</b>   |                          | <b>Quantity</b>  | <b>Fee Due</b> |
| 0      2      9      9   |                          | 1  | \$92,064.78    |
|  |                          |  | \$92,064.78    |
|  |                          | <b>Total Due</b>   | \$92,064.78    |
| <b>Payment Method:</b> Check <input type="checkbox"/> (Attach)<br>Credit card <input checked="" type="checkbox"/> (Complete Below) |                          |  |                |
| <input checked="" type="checkbox"/> MasterCard<br><br><input checked="" type="checkbox"/> VISA                                     |                          |  |                |
| Account No.: [Redacted]  |                          |  |                |
| Expiration: [Redacted] / [Redacted]<br>Month Year  |                          |  |                |
| I hereby authorize the FCC to charge my MasterCard or VISA for the service(s) / authorization(a) herein described.                 |                          |  |                |
| AUTHORIZED SIGNATURE   |                          | DATE   |                |